

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

JOHN ALCINDOR,)	
)	
Appellant,)	D.C. Crim. App. No. 2002/084
)	
v.)	Re: T.C. Crim. No. 91/2002
)	
GOVERNMENT OF THE VIRGIN ISLANDS,)	
)	
Appellee.)	
)	

On Appeal from the Territorial Court of the Virgin Islands

Considered: September 17, 2004

Filed: November 30, 2004

BEFORE: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **IVE A. SWAN**, Judge of the Territorial Court, Sitting by Designation.

ATTORNEYS:

B. Patricia Welcome, Esq.,
 Attorney for Appellant.

Maureen Phelan, AAG
 Attorney for Appellee.

MEMORANDUM OPINION

PER CURIAM.

John Alcindor ["Alcindor"] appeals from his conviction on three counts of assault in the third degree and one count each of unauthorized possession of a firearm and reckless endangerment in

the first degree. Those charges stemmed from a January 30, 2002 incident in which Alcindor fired several shots at three individuals in the Mutual Homes housing community. At trial, Alcindor was represented by a Territorial Public Defender.

Alcindor was convicted of the aforementioned charges following a jury trial. He was sentenced to three years imprisonment for each count of assault in the third degree; 15 years imprisonment and a fine of \$25,00 for the unauthorized possession charge; and three years imprisonment for reckless endangerment, each term to be served concurrently. (Appendix ["App."] at 10-11). Alcindor's appellate counsel, Attorney B. Patricia Welcome ["Attorney Welcome"], has filed a brief in this case asserting the absence of merited issues for appeal and seeking to withdraw as counsel and dismissal of the appeal, pursuant to *Anders v. California*, 386 U.S. 738 (1967).¹ Because the Court is aware that appellate counsel is no longer practicing as a private attorney, we will grant the instant motion to withdraw on those grounds. However, having determined that counsel has failed to conduct a full review of the record in accordance with the command of *Anders*, we will decline to dismiss the appeal and will appoint new counsel

¹ Counsel's brief was served on the appellant in accordance with *Anders*, 386 U.S. at 744; however, the appellant has filed no response.

to continue with this appeal or to file a conforming Anders brief.

I. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction to review final judgments and orders of the Territorial Court in criminal cases, other than on a guilty plea. See V.I. CODE ANN. tit. 4, § 33; Section 23A of the Revised Organic Act.² We exercise plenary review over constitutional claims and questions of law. See *Maddox v. Government of V.I.*, 121 F. Supp. 2d 457, 459 (D.V.I. App. Div. 2000); see also *Phipps v. Government of V.I.*, 241 F. Supp.2d 507 (D.V.I. App. Div. 2003).

II. DISCUSSION

Where counsel seeks to withdraw as appointed appellate counsel and asserts a lack of merited issues, the reviewing court must satisfy itself that counsel has conscientiously combed the record for appealable issues and that the appeal is, indeed, wholly frivolous. See *Anders*, 386 U.S. at 744; see also *Maddox*, 121 F. Supp. 2d at 459-60; *United States v. Javier-Lima*, 74 Fed. Appx. 172 (3d Cir. 2003). In accordance with *Anders*, appointed counsel must do more than submit a bare assertion of unappealable issues. See *Maddox*, 121 F. Supp. 2d at 460 (noting that counsel's

² See Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1614, reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 159-60 (1995 & Supp. 2003) (preceding V.I. CODE ANN. tit. 1).

brief, which amounted to a mere certification of meritless appeal, "fail[s] to draw attention to 'anything in the record that might arguably support the appeal'" and therefore does not comport with *Anders* and its progeny)(quoting *Penson v. Ohio*, 488 U.S. 75, 81-82(1988)). Rather, counsel is required to submit a brief which refers "to anything in the record that might arguably support an appeal" and must additionally explain why the issues are frivolous. *Anders*, 386 U.S. at 744; *United States v. Youla*, 241 F.3d 296, 300 (3d Cir. 2001)(noting that while counsel's *Anders* brief need not rehash every possible claim, it must meet the standard of "conscientious examination" outlined in *Anders*). The reviewing court is then charged with the responsibility to independently review the record before concluding the appeal has no merit. *See Anders*, 386 U.S. at 744.

In *Anders*, the Court rejected as insufficient a mere letter by counsel indicating that he had determined after consultation with the client that there were no meritorious issues for appeal. The court noted that safeguarding the defendant's constitutional rights to equal protection and the right to counsel and a full appellate review required more advocacy by appellate counsel:

The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. . . . His

role as advocate requires that he support his client's appeal to the best of his ability. . . .

This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel.

Id. at 744-45. Also in *Penson*, 488 U.S. at 78-82, the Court held appellate counsel's motion to withdraw should not have been granted where the request was supported only by a bare assertion of no merit and there was no evidence of zealous advocacy by appellate counsel on behalf of the client. Most recently, the Third Circuit in *United States v. Marvin*, 211 F.3d 778 (3d Cir. 2000) rejected an *Anders* brief where the record submitted did not contain the relevant trial objections nor provided "sufficient indicia" that counsel had adequately scoured the record for appealable issues. See *Marvin*, 211 F.3d at 780-81 (3d Cir. 2000) (relying on *United States v. Tabb*, 125 F.3d 583 (7th Cir. 1997)). That Court noted that briefs submitted pursuant to *Anders* must be rejected where counsel simply presents arguments as proposed by the defendant without discussing their faults, or where the court is not satisfied that counsel "adequately attempted to uncover the best arguments for his or her client." *Id.* Finally, in *Maddox*, 121 F. Supp. 2d at 459-60, this Court

held *Anders* was not satisfied where counsel's "slim brief" and appendix contained little to shed light on the proceedings below or the pre- or post-trial motions or hearings, and which failed to draw attention to anything in the record that might arguably support the appeal. Citing counsel's failure to even mention events occurring at trial as strong inference counsel had not combed the record for appealable issues and likening the *Anders* filing to the certification of meritless appeal rejected in *Penson v. Ohio*, 488 U.S. 75, 81-82, we noted: "That it looks like and has the shape and color of an appellate brief does not conceal the fact that it is essentially the naked assertion of the type rejected in *Anders* for failing to draw the attention of the Court to any issues" and essentially "deprived the court of the assistance of an advocate in its own review of the cold record on appeal." *Maddox*, 121 F. Supp. 2d at 459.

The brief submitted in this instance bears a striking resemblance to that previously rejected by the courts in *Maddox*, *Marvin* and their progeny. Counsel makes only a brief reference to several issues which she asserts Alcindor expressed a desire to challenge: 1) ineffective assistance of trial counsel; 2) retroactive application of the amended gun law; and 3) bias by the trial judge. The brief submitted contains only a record of the sentencing hearing, in which trial counsel challenged the

applicability of the newly amended gun law to the instant case. No record of the trial leading to Alcindor's conviction is contained in the appellate record. The absence of any record in the appendix, counsel's assertions that the appeal was filed at the appellant's urging, and her asserted reliance on the appellant to identify the issues and the rationales therefor, (See Br. of Appellant at 3-4), strongly suggest that counsel did not conduct a searching inquiry into the record for appealable issues as *Anders* requires. Noticeably absent is any assertion that counsel has reviewed the trial record and determined there were no merited issues for appeal. Here, as in *Maddox*, the record as submitted also sheds no light on what occurred at trial or the court's determinations on pre- or post-trial motions, to afford this Court an opportunity to independently assess whether there are issues which may arguably support an appeal. Moreover, with the exception of the retroactivity argument --which is fully supported on the record with a transcript of trial counsel's arguments and the court's ruling -- counsel's determination that the issues urged by Alcindor are frivolous is based solely on Alcindor's asserted bases for those arguments, and not based on a review of the record:

Secondly, Mr. Alcindor informed undersigned counsel in discussions that the basis of his allegation that Attorney Washington was ineffective was Attorney

Washington's failure to ask Judge Ross to recuse himself from Mr. Alcindor's case, which is the subject of this appeal. Notwithstanding Mr. Alcindor's admission that the prior unidentified case before Judge Ross ended in a dismissal and the fact that Mr. Alcindor was not convicted in that prior case, Mr. Alcindor nevertheless wanted Judge Ross off this current case.

(Br. of Appellant at 4). Counsel also provided no discussion on the issue of bias by the trial judge, except to assert in the statement of the facts that Alcindor contends the trial judge was biased because he had presided over a prior criminal matter involving the appellant. (Br. of Appellant at 3-4). Counsel further stated the following basis for concluding there were no appealable issues in this regard: "In a conversation with Mr. Alcindor at the Golden Grove prison, Mr. Alcindor could not recall the name of the prior case before Judge Ross, the case number, or the name of his co-defendant at the time.

Interestingly enough, Mr. Alcindor recalled that there was no trial, the Judge subsequently dismissed the case, and that no one was convicted in the case." (Br. of Appellant at 3-4). Appellate counsel did not present the standards for reviewing each challenge nor attempted to apply the facts of this case to those standards. This falls far short of what is required under *Anders*.

III. CONCLUSION

This Court will grant Attorney Welcome's motion to withdraw, as we are aware counsel is now employed as a government attorney. However, we are not satisfied that Attorney Welcome has reviewed the trial record for appealable issues, as required under *Anders*. Accordingly, we will appoint new appellate counsel to prosecute this appeal. See *Maddox*, 121 F. Supp. 2d at 459-60 (discussing options available to the court to preserve appellant's Sixth Amendment rights, where nonconforming brief is filed). An appropriate order follows.

A T T E S T:

WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

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ATTORNEYS:

B. Patricia Welcome, Esq.,
 Attorney for Appellant.

Maureen Phelan, AAG
 Attorney for Appellee.

JUDGMENT OF THE COURT

PER CURIAM.

AND NOW, for the reasons stated in a Memorandum Opinion of even date, it is hereby

ORDERED that counsel's motion to dismiss the appeal as unmerited **DENIED**. It is further

ORDERED that Attorney Welcome's motion to withdraw as appellate counsel is **GRANTED**. It is further

ORDERED that **Jomo Meade, Esq.** is appointed to prosecute this appeal. Finally, it is

ORDERED that the Clerk of the Court shall enter a new Briefing Schedule in this matter.

SO ORDERED this 30th day of November, 2004.

A T T E S T:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk